136

700472

Sup. Ct.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 65

ASHBACKER RADIO CORPORATION, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 24, 1945.

CERTIORARI GRANTED MAY 28, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1196

ASHBACKER RADIO CORPORATION, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX.

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8871

ASHBACKER RADIO CORPORATION, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

Notice of Appeal from Decision and Order of the Federal Communications Commission and Statement of Reasons Therefor—Filed September 30, 1944

I

NOTICE OF APPEAL

Ashbacker Radio Corporation, a Michigan corporation, gives Notice of Appeal under Section 402(b) (2) of the Communications Act of 1934 from a decision and order of the Federal Communications Commission adopted June 27, 1944 (Appellant's Petition for Rehearing denied September 12, 1944) granting an application of John E. Fetzer and Rhea Y. Fetzer, co-partners d/b as Fetzer Broadcasting Company for construction permit for a new broadcast station to operate at 1230 kilocycles, 250 watts, unlimited time, at Grand Rapids, Michigan.

[fol. 2] II

STATEMENT OF APPELLANT'S INTEREST

1. Appellant is the licensee of WKBZ, a broadcasting station operating at 1490 kilocycles with power of 250 watts, unlimited time, at Muskegon, Michigan.

2. On April 29, 1944 appellant filed with the Federal Communications Commission an application dated April 27, 1944 requesting a change in frequency for WKBZ from 1490 kilocycles to 1230 kilocycles to which application the Commission assigned the file designation B2-P-3609.

3. There was pending before the Commission at the time the WKBZ application was filed an application designated B2-P-3590, filed March 20, 1944 by John E. Fetzer and Rhea Y. Fetzer, d/b as Fetzer Broadcasting Company for a new station to operate at 1230 kilocycles, 250 watts, unlimited time, at Grand Rapids, Michigan.

4. On June 28, 1944 the Commission announced that on the previous day, without notice to appellant and without affording appellant any opportunity to be heard, upon a mere examination of the two applications, it had granted Fetzer Broadcasting Company a construction permit for a new station to use 1230 kilocycles, at Grand Rapids (Commissioner Case dissenting), and had designated for hearing appellant's application for the use of 1230 kilocycles at Muskegon.

5. Since Muskegon and Grand Rapids are only 50 miles apart, the Commission could not grant both the applications of appellant and of Fetzer Broadcasting Company. These applications were and are mutually exclusive and a grant of either requires a denial of the other.

[fol. 3] 6. On July 17, 1944 appellant filed with the Commission a timely "Petition for Hearing, Rehearing or Other Relief" in which, among other things, it was asserted that the Commission's action in granting the Fetzer application was contrary to the requirements of Section 307(b) of the Communications Act and violative of Section 3.35 of its own Rules and Regulations dealing with multiple station ownership in that Fetzer Broadcasting Company owns and operates a station, WKZO at Kalamazoo, which serves Grand Rapids. This Petition was denied by the Commission on September 12, 1944.

7. On August 1, 1944, while appellant's petition of July 17, 1944 was pending before it and undecided, the Commission addressed to appellant a "Notice of Hearing." This "Notice of Hearing" purports to afford appellant a hearing upon its own application (but not upon the Fetzer Broadcasting Company application) for 1230 kilocycles. It states:

> "The application involved herein (meaning appellant's application) will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing."

Issue #3 of said Notice asserts that one of the purposes of the hearing is:

> "To determine the extent of any interference which would result from the simultaneous operation of station WKBZ as proposed, and station * * * WJEF"

meaning, by the call letters WJEF, the station authorized on June 27, 1944 to be constructed by Fetzer Broadcasting Company to operate at 1230 kilocycles at Grand Rapids.

This "Hearing" is scheduled to take place on October 3, 1944.

[fol. 4]

III

Specifications of Error

The action of the Commission taken on June 27, 1944 and affirmed on September 12, 1944 is without warrant in law, is contrary to law, and is arbitrary, capricious and oppressive in the following respects:

1. It denies to appellant the full and fair hearing to which appellant is entitled under the Communications Act and attempts to substitute therefor a futile proceeding in which all substantive issues have been predetermined without hearing adversely to appellant.

2. It violates the due process clause of the Fifth Amendment of the Constitution of the United States.

3. It contravenes Section 307(b) of the Communications Act of 1934 under which the Commission is required "to make and maintain a fair, efficient and equitable distribution of radio service," among the several states and communities.

4. It contravenes Section 3.24 of the Commission's Regulations which implement Section 307(b) of the Communications Act.

5. It contravenes Section 3.35 of the Commission's Regulations with respect to multiple ownership of broadcasting stations.

Relief Requested

Wherefore, appellant prays an Order of this Court:

A. Reversing and setting aside the Order of the Federal Communications Commission hereinabove described taken on June 27, 1944;

[fol. 5] B. Remanding the case to the said Commission for proceedings consistent with law; and,

C. For such other and further relief as may be just and proper.

Respectfully submitted, Ashbacker Radio Corporation, by Philip J. Hennessey, Jr., George S. Smith, Harold G. Cowgill; Segal, Smith & Hennessey, 1026 Woodward Building, Washington 5, D. C. Attorneys for Appellant.

September 30, 1944.

Proof of Service

Receipt is acknowledged this — day of September 1944 of a true copy of the foregoing Notice of Appeal.

Federal Communications Commission, by J. J. Slowie.

[fol. 6] [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia

[Title omitted]

Motion for Stay Order—Filed September 30, 1944

1. Ashbacker Radio Corporation has this day noted its appeal from a decision of the Federal Communications Commission dated June 27, 1944 (Rehearing denied September 12, 1944) granting an application of John E. Fetzer and Rhea Y. Fetzer, d/b as Fetzer Broadcasting Company, for a new broadcast station to operate at 1230 kilocycles, 250 watts, unlimited time at Grand Rapids, Michigan. Reference is made to said "Notice of Appeal and Statement of Reasons Therefor" for greater certainty.

2. The action complained of was taken without notice to appellant or any opportunity to be heard notwithstanding that appellant had pending before the Commission a mutually exclusive application for the use of 1230 kilocycles at Muskegon, Michigan.

3. On July 17, 1944 appellant filed with the Commission a "Petition for Hearing, Rehearing and Other Relief" asserting all the errors upon which appellant relies in this Court. This Petition was denied on September 12, 1944.

[fol. 7] 4. The Commission's action of June 27, 1944 consisted merely of a minute entry that the Fetzer application had been granted and was not accompanied by any opinion or statement of reasons for the action. In denying appellant's Petition of July 17, 1944, however, the Commission issued a written Decision and Order, a copy of which, dated September 12, 1944, is attached hereto as Exhibit A.

5. The scope of the questions of law and fact raised by the applications may be gauged from Exhibit A and more particularly from the findings of fact set forth on pages 3 and 4 thereof, all of which have been made without affording appellant an opportunity to be heard. Appellant denies that said findings are either accurate or adequate to sustain the Commission's action.

6. On August 1, 1944, while appellant's Petition of July 17, 1944 was pending before it, the Commission issued to appellant a purported "Notice of Hearing" which, upon its face, affirms the Commission's intention not to afford the full, fair, comparative and competitive hearing to which appellant is entitled. Instead of affording both applicants a proper opportunity to present their respective claims for the use of 1230 kilocycles as an unused frequency in central Michigan, said Notice imposes upon appellant the burden of applying for a frequency which Fetzer Broadcasting Company will be using under the call letters WJEF as soon as construction can be completed. Fetzer Broadcasting Company now has pending before the Commission a petition to participate in this "Hearing" not as an applicant on equal footing with appellant but as an intervenor in defense of an assignment already granted.

[fol. 8] 7. This hollow and entirely meaningless hearing is scheduled for October 3, 1944. Unless stayed by action of

this Court, Fetzer Broadcasting Company will have completed the construction of its station at Grand Rapids before any Commission decision upon appellant's application and thereupon will be entitled, not as a matter of Commission discretion but as a matter of right, to a license under Section 319(b) of the Communications Act. Appellant has pending a motion for postponement of the hearing now scheduled for October 3, 1944 upon which motion no action has yet been taken.

8. In its Petition of July 17, 1944 appellant requested the Commission to stay the issuance of any construction permit to Fetzer Broadcasting Company until this Court should have had an opportunity to take action on this appeal. The Commission has denied appellant any administrative stay (Exhibit A, p. 5).

9. There is no plain, adequate or speedy remedy to prevent irreparable injury to appellant other than the issuance of a stay by this Court. Even a final decision in favor of appellant by this Court could not restore the parties to the positions they occupied on June 27, 1944 if appellant is required to participate in the hearing scheduled for October 3, 1944 and Fetzer Broadcasting Company constructs the station which the Commission has authorized at Grand Rapids.

10. There is no plain, adequate or speedy remedy to prevent irreparable injury to the public other than the issuance of an order of stay by this Court. An adequate record of the needs of Muskegon and Grand Rapids for additional radio service can be made only by affording appellant and Fetzer Broadcasting Company a full and fair opportunity in a proper hearing to demonstrate which application would better serve public interest, convenience and necessity.

[fols. 9-19] 11. No injury either to Fetzer Broadcasting Company or to the public can result from the granting of the stay order requested herein. There will be no diminution in the service presently available to Grand Rapids from the two stations now located there. Fetzer Broadcasting Company will be in no wise prejudiced should the Commission, on a proper record, ultimately grant its application.

12. Appellant's position is supported by the decision of this Court in *Colonial Broadcasters, Inc.* v. *Federal Com-*

munications Commission, 70 App. D. C. 258, 105 F. (2d) 781. In that case the appellant did not file his application until after the Commission had designated an earlier application for hearing. The Ashbacker and Fetzer applications were presented to the Commission for action on the same day. Had the Commission followed the rule approved by this Court in *Colonial Broadcasters, Inc.* v. *Federal Communications Commission*, it would have designated both applications for a consolidated hearing. Compare *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

13. This Court's authority to issue stay orders in appeals under Section 402(b) (2) to prevent a change in status through mere lapse of time is unquestioned. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4.

Wherefore, appellant respectfully prays that this Court issue its order to the Commission suspending the effectiveness of the Commission's actions of June 27, 1944 and September 12, 1944 granting to Fetzer Broadcasting Company the authority complained of pending the determination of the present appeal.

Respectfully submitted, Ashbacker Radio Corporation, by Philip J. Hennessey, Jr., George S. Smith, Harold G. Cowgill. Segal, Smith & Hennessey, 1026 Woodward Building, Washington 5, D. C., Attorneys for Appellant.

September 30, 1944.

[fol. 20] PROOF OF SERVICE

Receipt is acknowledged this 30th day of September, 1944 of a true copy of the foregoing Motion for Stay Order.

Federal Communications Commission, by ——,
John E. Fetzer and Rhea Y. Fetzer, d/b as Fetzer Broadcasting Company, by ——.

[fol. 21] EXHIBIT "A" TO MOTION

77760

Corrected Copy

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON 25, D. C.

File No. B2-P-3590

In re Application of JOHN E. FETZER AND RHEA Y. FETZER d/b as FETZER BROADCASTING COMPANY, Grand Rapids, Michigan

For Construction Permit

Decision and Order on Petition for Hearing, Rehearing and Other Relief

By the Commission (Case, Commissioner, dissenting; Fly, Chairman and Wakefield, Commissioner, not participating):

The Commission has before it a petition filed (July 17, 1944) by Ashbacker Radio Corporation (WKBZ), Muskegon, Michigan, for hearing, rehearing or other relief, which is directed against the action of the Commission June 27, 1944 granting the application filed (March 20, 1944) by John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, for construction permit (B2-P-3590) to erect a new standard broadcast station at that place to operate on the frequency 1230 kc with 250 watts power, unlimited time.

Petitioner's station, WKBZ, is licensed to operate on the frequency 1490 kc with 250 watts power, unlimited time. On May 5, 1944, petitioner filed an application for construction permit (B2-P-3609) requesting a change in frequency from 1490 kc to 1230 kc.

The simultaneous use of 1230 kc at Grand Rapids and Muskegon, Michigan would result in intolerable interference to both applicants, and therefore these applications are actually exclusive. The Commission on June 27, 1944, upon comparative examination of the two applications, found that a grant of the Fetzer application (B2-P-3590) would serve public interest, convenience and necessity, and accordingly, granted the same pursuant to Section 309(a)

of the Communications Act of 1934. Since a grant of the Fetzer application precluded a grant without hearing of the Ashbacker application (B2-P-3609), the Commission on the same day designated the latter application for hearing in accordance with Section 309(a) of the Act.

The petition alleges that "WKBZ is the only station rendering a primary service to Muskegon County, population 107,852"; that upon its presently assigned frequency of 1490 kc, "and under the high attenuation conditions which prevail in that area", WKBZ is unable to render satisfactory service during day time to those sections of the County more than 15.5 miles distant from its transmitter; that at night, WKBZ, is unable to render a satisfactory service to portions of greater Muskegon or to communities such as Fruitport and Laketon "which are normally tributary to Muskegon"; that the purpose of its application to change frequency "was to extend WKBZ's service to lis- [fol. 22] teners who do not now receive primary service from any station"; that the City of Grand Rapids and portions of Kent County (where the new Fetzer station is to be located) now received primary service from Stations WOOD (5 kw-1300 kc—unlimited time) and WLAV (250 watts-1340 kc—unlimited time), both in Grand Rapids; and that a third station at Grand Rapids operating with 250 watts, unlimited time on 1230 kc will simply provide "a third service for listeners already well served by these two existing stations".

The petition further alleges that Station WKZO at Kalamazoo, Michigan "with 5000 watts power, unlimited time on 590 kc renders primary service to Grand Rapids, advertises that its coverage to Grand Rapids is satisfactory and maintains studios at Grand Rapids". Upon information and belief, it is alleged that WKZO is owned and operated by Fetzer Broadcasting Company, a Michigan corporation, which is controlled by John E. Fetzer and Rhea Y. Fetzer, the applicant in B2-P-3590.

Based upon the foregoing allegations, petitioner contends that the grant of the Fetzer application and the designation of petitioner's application for hearing:

1. Contravenes Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission in that "it provides an additional radio broadcasting service to a community already well served at the expense of the listeners in the

vicinity of Muskegon who do not now have a single primary service";

2. Results in common ownership of two stations "each of which renders primary service to a substantial portion of the primary service of the other contrary to Section 3.35 of the Commission's Rules";

3. Denies to petitioners "the fair hearing to which every applicant is entitled under Section 309(a) of the Communications Act and attempts to substitute therefore a 'hearing' after all the issues between Ashbacker and Fetzer have been resolved in favor of Fetzer"; and

4. "Violates the due process clause of the Fifth Amendment to the Constitution of the United States".

Petitioner prays that the Commission reconsider and set aside its action granting the Fetzer application, designate both applications for a public hearing or, in the alternative, stay the issuance of the construction permit for the use of 1230 kc to Grand Rapids until action is taken upon this petition and until petitioner has had an opportunity to file its notice of appeal with the Court of Appeals pursuant to Section 402(b) (2) of the Communications Act of 1934.

On July 22, 1944, the opposition of Fetzer Broadcasting Company to the Ashbacker petition was filed.

[fol. 23] A comparison of important facts relating to the two applications indicates the following:

A. United States Census Figures (1940)

Muskegon, Michigan: Population, 47,697. (Not a metropolitan center.)

Grand Rapids, Michigan: Population, 164,292. (Grand Rapids metropolitan district: population, 209,873.)

B. Service Proposed by Each

Ashbacker, Muskegon, Mich.: Proposed nighttime service, 81,629. Present nighttime service, 77,657. Proposed gain in service, 3,972 (about 5%). Proposed daytime service, 107,340. Present daytime service, 97,525. Proposed gain in service, 9,815 (about 10%).

Fetzer, Grand Rapids, Michigan: Proposed (new) nighttime service, 202,800. Proposed (new) daytime service, 238,800.

C. Interference to Existing Stations from the Operation of Each Station as Proposed

Ashbacker, Muskegon, Michigan: Involves objectionable interference to about 5% of the primary daytime service area of Station WHBY, Appleton, Wisconsin.

Fetzer, Grand Rapids, Michigan: Does not involve objectionable interference to any existing station.

D. Primary Service Now Received by Each Area Day and Night

Muskegon, Michigan: Daytime: WGN and WMAQ, Chicago, Ill.; WOOD, Grand Rapids, and WKZO, Kalamazoo, Mich.; WTNJ, Milwaukee, Wisconsin. Nighttime: WGN and WMAQ, Chicago, Ill.

Grand Rapids, Michigan: Daytime: WOOD and WLAV, Grand Rapids, Mich.; WJR, Detroit, Mich.; WGN and WMAQ, Chicago, Ill.; WKZO, Kalamazoo, Mich. Nighttime: WOOD and WLAV, Grand Rapids, Mich.; WJR, Detroit, Mich.; WGN and WMAQ, Chicago, Ill.

[fol. 24] From the foregoing, it is manifest that the Fetzer grant does not, as petitioner contends, contravene Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission in so far as these require the Commission to provide a fair, efficient and equitable distribution of radio service among the several states and communities, since the change in frequency requested by petitioner would if granted, result in a slight increase in service to an area and population which already receives primary service day and night from several stations, and this slight increase in service to the Muskegon area would be offset by the objectionable interference to Station WHBY at Appleton, Wisconsin, by about the same proportion as the increase in nighttime service to the Muskegon station as a result of its operation as proposed; whereas the Fetzer grant will result in the establishment of a new service to a very substantial population which can be instituted without resulting in objectionable interference to any existing service.

Petitioner also contends that it was error for the Commission to grant the Fetzer application because it results in "common ownership of two stations, each of which renders

primary service to a substantial portion of the primary service area of the other, contrary to Section 3.35[1] of the Commission's Regulations". This contention is without merit. Although it is true that Station WKZO, Kalamazoo, Michigan, is owned by a Michigan corporation whose controlling stockholders are the applicants for the Grand Rapids station, it is not true that the proposed Grand Rapids station and Station WKZO, Kalamazoo, each "renders service to a substantial portion of the primary service area of the other". In its Public Notice of April 4, 1944, the Commission announced that in determining whether there was such an overlapping in a particular case, it would give consideration to "location of centers of population and distribution of population, location of main studios, areas and populations to which services of stations are directed as indicated by commercial business of stations, news broadcasts, sources of programs and talent, coverage claims and listening audience." The proposed Grand Rapids station, operating on 1230 kc with 250 watts power, approximately 50 miles distant from Kalamazoo, will not render primary service, day or night, to any part of the city of Kalamazoo, Michigan and environs. Because of objectionable interference which the Kalamazoo station receives at night from an existing station, WKZO will not render primary service at night to any portion of the primary service area of the Grand Rapids station, and in the daytime, because of the high noise level in Grand Rapids, WKZO does not render primary service to the business district of Grand Rapids. Moreover, Grand Rapids, which is the second largest business market in Michigan, is a separate and distinct community in a separate and distinct trade area from Kalamazoo, Michigan. In view of these facts,

---

[1] Section 3.35 of the Commission's Rules and Regulations provides that: "No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

we hold that a grant of the Fetzer application would be consistent with the provisions of Section 3.35 of our Rules and Regulations.

[fol. 25] Finally, petitioner alleges that the grant of the Fetzer application denies to it a fair hearing to which it is entitled under Section 309(a) of the Communications Act and that it violates the due process clause of the 5th Amendment to the Constitution of the United States. These allegations are entirely without merit. The Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company (WEEU)*, Reading, Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association (WWJ)*, Detroit, Michigan, 8 FCC 552 (1941); In re: *Merced Broadcasting Company (KYOS)*, Merced, California, 9 FCC 118, 120 (1942).

From a careful review of the Ashbacker petition, the applications of Ashbacker Radio Corporation (B2-P-3609) and John E. and Rhea Y. Fetzer (B2-P-3590), and the opposition filed by Fetzer Broadcasting Company to the Ashbacker petition, the Commission finds that no valid reason has been disclosed for setting aside the June 27, 1944 grant to the Fetzer Broadcasting Company. Moreover, no reason appears in the petition why the Fetzer grant, which the Commission has found would be in the public interest, should be stayed pending the filing by the petitioner of a Notice of Appeal in the United States Court of Appeals for the District of Columbia.

Accordingly, It Is Ordered, This 12th day of September, 1944, that the petition of Ashbacker Radio Corporation for hearing, rehearing, or other relief, directed against the action of the Commission June 27, 1944, granting the application of John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, for construction permit (B2-P-3590), Be, And It Is Hereby, Denied.

It Is Further Ordered, That the request in said petition for stay of the issuance of any construction permit for the

use of 1230 kilocycles at Grand Rapids, Michigan, Be, And It is Hereby Denied.

Federal Communications Commission, T. J. Slowie, Secretary.

[fol. 26] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION FOR STAY ORDER—Filed October 6, 1944

On March 20, 1944, John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, filed an application for construction permit to erect a new standard broadcast station at Grand Rapids, Michigan, to operate on the frequency 1230 kc, with 250 watts power, unlimited time. On May 5, 1944, appellant, which is now licensed to operate Station WKBZ, Muskegon, Michigan, on the frequency 1490 kc, with 250 watts, unlimited time, filed an application for a construction permit requesting a change in frequency for WKBZ from 1490 kc to 1230 kc. As the simultaneous use of 1230 kc at Grand Rapids and Muskegon, Michigan, would result in intolerable interference to both applicants, these two applications are mutually exclusive.

The Commission, on June 27, 1944, upon a comparative examination of the two applications found that a grant of the Fetzer application would serve the public interest, convenience, and necessity, and granted that application pursuant to Section 309 (a) of the Communications Act of 1934. On the same day the Commission designated appellant's application for hearing, pursuant to Section 309(a) of the Communications Act. The hearing was scheduled for October 3, 1944, but on motion of appellant the hearing has been continued until December 5, 1944.

On July 17, 1944, appellant filed with the Commission a petition for hearing, rehearing, or other relief directed against the action of the Commission granting the Fetzer application, and requesting a stay of the Fetzer grant.

Upon careful review of the petition, which presented the same issues as are involved in the appeal to this Court, the Commission on September 12, 1944 entered an opinion and order denying appellant's petition. In its opinion, which [fol. 27] is "Exhibit A" attached to appellant's motion in this Court for a stay order, the Commission found that the grant of appellant's application would result in an increase of about 3,972 night time listeners—an increase of about 5%—and an increase of about 9,815 daytime listeners —an increase of about 10%—in an area which already receives primary service from five other stations during the day and two other stations at night. Moreover, even this slight increase in service would be at the cost of objectionable interference to station WHBY, Appleton, Wisconsin. On the other hand, it was found that a grant of the Fetzer application would result in the establishment of a new service to a very substantial population estimated at 202,800 for night time service and 238,800 for daytime service, without resulting in objectionable intereference to any existing station.

The Commission further found in its opinion that there was no substance in appellant's contention that a grant of the Fetzer application results in "common ownership of two stations, each of which renders primary service to a substantial portion of the primary service area of the other," contrary to Section 3.35[1] of the Commission's Rules and Regulations. Appellant contended that the Commission's rule was violated because the controlling stockholders in the Fetzer Corporation also control the corporation which owns station WKZO, Kalamazoo, Michigan. The opinion, however, pointed out that the proposed Grand Rapids station operating on 1230 kc, with 250 watts

---

[1] Section 3.35 of the Commission's Rules and Regulations provides that: "No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

power, approximately 50 miles distant from Kalamazoo, will not render primary service day or night to any part of the City of Kalamazoo, Michigan and its environs. Also, the Kalamazoo station will not render primary service at night to any portion of the primary service area of the Grand Rapids station, and in the daytime does not render primary service to the important business district of Grand Rapids because of the high noise level in Grand Rapids. Moreover, as the opinion states, Grand Rapids is the second largest business market in Michigan and is a separate [fol. 28] and distinct community in a separate and distinct trade area from Kalamazoo, Michigan. In view of these facts the Commission concluded that a grant of the Fetzer application would not be inconsistent with the provisions of Section 3.35 of the Commission's Rules and Regulations.

Appellant also argued before the Commission that a grant of the Fetzer application resulted in a denial to appellant of a fair hearing to which it is entitled under Section 309(a) of the Communications Act and violates the due process clause of the Fifth Amendment of the Constitution. The Commission's opinion expressly points out, however, that appellant's application has not been denied but has been designated "for hearing as required by Section 309(a) of the Act", and that at this hearing appellant "will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date, from taking any action which it may find will serve the public interest."

It was for the foregoing reasons that the Commission denied appellant's petition for hearing, rehearing, or other relief. Upon the denial of this petition appellant filed in this Court its notice of appeal and motion for stay order.

Appellant has completely failed to justify the issuance of a stay order. In the first place, as will be discussed in greater length in a motion to dismiss the appeal which the Commission intends to file, appellant does not have standing to maintain this appeal. As has been pointed out above, appellant's application has not been denied, but has been designated for hearing in accordance with Section 309(a) of the Communications Act. At that hearing appellant will have ample opportunity to show that a grant

of its application rather than the Fetzer application would better serve the public interest. If appellant demonstrates at that hearing that a grant of its application rather than the Fetzer application will better serve the public interest, the Commission will be required to grant appellant's application even though such action would necessitate modification or revocation of the construction permit granted the Fetzer Company. Accordingly, appellant's opportunity to press its application to the fullest has in no way been impaired by a grant of the competing Fetzer application. [fol. 29] This Court has held that an applicant has no standing to appeal under § 402(b)(2) of the Communications Act where his application has been designated for hearing after mutually exclusive application has been granted without hearing. *Palmer v. Federal Communications Commission*, App. D. C. No. 7542, Feb. 16, 1940; *Frequency Broadcasting Corp. v. Federal Communications Commission*, App. D. C. No. 8055, April 26, 1942.

In the second place, appellant has utterly failed to show that a grant of the Fetzer application has caused or will cause it any irreparable injury. As a matter of fact its motion for stay order does not even allege that there will be any such irreparable injury, and it is difficult to perceive how such a contention could be supported. The grant of a construction permit merely authorizes construction of the physical facilities of a station. Operation of the station may be conducted only pursuant to a station license. Moreover, as has already been indicated, despite any station construction engaged in by the Fetzer company pursuant to its construction permit, that permit remains subject to future modification or revocation by the Commission, if required in the public interest, and remains subject to the outcome of any appeal from Commission action in that case that appellant may take. It is difficult to see how appellant can possibly be injured by the issuance of a construction permit which merely authorizes the Fetzer Broadcasting Company to construct a station.

It is, therefore, submitted that appellant's motion for stay order should be denied.

Federal Communications Commission, Charles R. Denny, General Counsel; Harry M. Plotkin, Assistant General Counsel; Joseph M. Kittner, Counsel.

Acknowledgment of Service

Service of the foregoing Opposition to Motion for Stay Order is hereby acknowledged and a true copy thereof received this 6th day of October, 1944.

Philip J. Hennessey, Jr., Counsel for Appellant.

[fol. 30] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

APPELLEE'S MOTION TO DISMISS THE APPEAL—Filed October 28, 1944

The Federal Communications Commission, appellee in the above-entitled cause, moves the Court to dismiss the appeal purportedly taken under Section 402(b) of the Communications Act of 1934, as amended, for the reason that the Court has no jurisdiction under Section 402(b) to entertain this appeal.

Respectfully submitted, Federal Communications Commission. Signed: Charles R. Denny, General Counsel. Harry M. Plotkin, Assistant General Counsel.

[fol. 31] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

BRIEF IN SUPPORT OF MOTION TO DISMISS THE APPEAL

Statement of Facts

On March 20, 1944, John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, filed an application for construction permit to erect a new standard broadcast station at Grand Rapids, Michigan, to operate on the frequency 1230 kilocycles, with 250 watts power, unlimited time. On May 5,

1944, appellant, which is now licensed to operate Station WKBZ, Muskegon, Michigan, on the frequency 1490 kilocycles with 250 watts power, unlimited time, filed an application for a construction permit requesting a change in frequency for WKBZ from 1490 kilocycles to 1230 kilocycles. As the simultaneous use of 1230 kilocycles at Grand Rapids and Muskegon, Michigan, would result in intolerable interference to both applicants, these two applications were mutually exclusive.

The Commission, on June 27, 1944, upon a comparative examination of the two applications, found that a grant of the Fetzer application would serve public interest, convenience, or necessity, and granted that application. On the same day, pursuant to Section 309(a) of the Communications Act, the Commission designated appellant's application for hearing for October 3, 1944.[1]

On July 17, 1944, appellant filed with the Commission a petition for hearing, rehearing, or other relief directed against the action of the Commission granting the Fetzer application, and requesting a stay of the Fetzer grant. Upon careful review of the petition, which presented the same issues as are involved in the appeal to this Court, the Commission on September 12, 1944, entered an opinion [fol. 32] and order denying appellant's petition. In its opinion, which is "Exhibit A" attached to appellant's motion in this Court for a stay order, the Commission found that a grant of appellant's application would result in an increase of about 3,972 night time listeners—an increase of about 5%—and an increase of about 9,815 daytime listeners —an increase of about 10%—in an area which already receives primary service from five other stations during the day and two other stations at night. Moreover, even this slight increase in service would be at the cost of objectionable interference to Station WHBY, Appleton, Wisconsin. On the other hand, it was found that a grant of the Fetzer application would result in the establishment of a new service to a very substantial population estimated at 202,800 for night time service and 238,800 for daytime service, without resulting in objectionable interference to any existing station.

---

[1] On motion of appellant the hearing has been postponed until December 5, 1944.

The Commission further found in its opinion that there was no substance in appellant's contention that a grant of the Fetzer application would result in "common ownership of two stations, each of which renders primary service to a substantial portion of the primary service area of the other," contrary to Section 3.35[2] of the Commission's Rules and Regulations. Appellant contended that the Commission's rule was violated because the controlling stockholders in the Fetzer Corporation also control the corporation which owns Station WKZO, Kalamazoo, Michigan. The opinion, however, pointed out that the proposed Grand Rapids station operating on 1230 kilocycles, with 250 watts power, approximately 50 miles distant from Kalamazoo, will not render primary service day or night to any part of the City of Kalamazoo, Michigan, and its environs. The opinion further pointed out that the Kalamazoo station will not render primary service at night to any portion of the primary service area of the Grand Rapids station, and in the daytime does not render primary service to the important business district of Grand Rapids because of the high noise [fol. 33] level in Grand Rapids. Moreover, as the opinion states, Grand Rapids is the second largest business market in Michigan and is a separate and distinct community in a separate and distinct trade area from Kalamazoo, Michigan. In view of these facts the Commission concluded that a grant of the Fetzer application would not be inconsistent with the provisions of Section 3.35 of the Commission's Rules and Regulations.

Appellant also argued before the Commission that a grant of the Fetzer application resulted in a denial to appellant of a fair hearing to which it is entitled under Section 309(a) of the Communications Act and violates the due process

---

[2] Section 3.35 of the Commission's Rules and Regulations provides that: "No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

clause of the Fifth Amendment of the Constitution. The Commission's opinion expressly points out, however, that appellant's application has not been denied but has been designated "for hearing as required by Section 309(a) of the Act," and that at this hearing appellant "will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date, from taking any action which it may find will serve the public interest."

It was for the foregoing reasons that the Commission denied appellant's petition for hearing, rehearing, or other relief. Upon the denial of this petition appellant filed in this Court its notice of appeal.

Argument

It is clear from a consideration of the provisions of the Communications Act prescribing the procedure to be followed by the Commission in passing upon applications for construction permits and licenses[3] that the action of the Commission in granting the Fetzer application and designating appellant's application for hearing does not aggrieve or adversely affect appellant's interest within the meaning of Section 402(b)(2) of the Communications Act and that hence appellant has no standing to maintain the appeal. Section 309(a) provides that the Commission shall grant [fol. 34] an application if upon examination thereof it can determine that public interest, convenience, or necessity will be served by the grant; otherwise, the Commission must designate the application for hearing. That is precisely what the Commission has done in this case. Since the Commission was able to determine from an examination of the Fetzer application that public interest would be

---

[3] Section 319 relating to applications for construction permits does not prescribe what procedure the Commission shall follow in passing upon applications; but the Commission uniformly follows the same procedure as to such applications as that prescribed in Section 309(a) relating to applications for licenses, renewals and modifications of licenses. See *Goss* v. *Federal Radio Commission*, 62 App. D. C. 301, 67 F. (2d) 507.

served by a grant of the application, it granted the application. Being unable to reach the same determination with respect to appellant's application, the Commission designated it for hearing. This does not mean that appellant's application has been denied. It has been designated for hearing, and the result of such hearing cannot be foretold. It would be unwarranted to assume as a basis for decision that the Commission will deny appellant's application after hearing because of the grant to Fetzer. See *Black River Valley Broadcast, Inc.* v. *McNinch*, 69 App. D. C. 311, 101 (2d) 235. If appellant can demonstrate at the hearing that public interest, convenience, or necessity will be better served by its proposed operation rather than that proposed in the Fetzer application the Commission must approve appellant's application; even though such approval necessitates the modification of the construction permit held by Fetzer [4] or the modification [4] of or refusal to renew [5] a license held by Fetzer. To be sure, as long as appellant and Fetzer desire conflicting facilities, the question whether the grant of either or both applications will serve the public interest rests on a comparison between the two proposals; but the grant to Fetzer does not alter the necessity for such comparison or affect the showing which appellant must make at the hearing on its application.

From the foregoing it is clear that appellant's opportunity to press its application to the fullest has in no way been impaired by a grant of the competing Fetzer application. Accordingly, appellant cannot assert that the grant to Fetzer has in any way prejudiced its position with reference to its own application. This being so, it is difficult to see what possible ground appellant can assert as the basis of its standing to maintain this appeal.

[fol. 35] The decisions of this court in *Palmer* v. *Federal Communications Commission*, App. D. C. No. 7542, February 16, 1940, unreported, and *Frequency Broadcasting*

---

[4] Section 312(b) provides that any outstanding license or construction permit may be modified if in the judgment of the Commission such action will promote the public interest, convenience, or necessity.

[5] Section 307(d) provides that renewals shall be governed by the same considerations as applications for new stations.

Corp. v. *Federal Communications Commission*, App. D. C. No. 8055, April 26, 1942, unreported, clearly hold that an applicant for a construction permit has no right which can be aggrieved by the grant of a mutually exclusive application. In the first of these cases, Palmer applied for a construction permit for a new station in Hot Springs, Arkansas. Wilson and Shuman had previously applied for the facilities requested by Palmer. The Commission granted the application of Wilson and Shuman and designated Palmer's for hearing. Palmer thereupon appealed to this Court as a person aggrieved or whose interests were adversely affected by the grant to Wilson and Shuman. The Commission moved to dismiss the appeal on the ground that Palmer was not aggrieved since the Commission was still obliged to hear Palmer's application and grant him a permit if public interest, convenience, or necessity would be served thereby, even if that would necessitate denial of a renewal of Wilson and Shuman's license. The Court granted the Commission's motion and dismissed the appeal without opinion, thereby upholding the Commission's contentions that the competing applicant was not a person aggrieved by the grant. Similarly, in the *Frequency Broadcasting Corp.* case, supra, this Court, upon motion of the Commission, dismissed an appeal taken by an applicant directed against the action of the Commission in granting a mutually exclusive construction permit application and designating the application of the appellant for hearing. In that case, as in the *Palmer* case and in the present case, the Commission had granted one of two mutually exclusive applications and set the other for hearing in accordance with the procedure outlined above. The appellant, whose application had been designated for hearing appealed and, as here, the Commission moved to dismiss the appeal upon the ground that appellant was not a person having a right or interest which was aggrieved or adversely affected. As in the *Palmer* case, the Court dismissed the appeal, thereby upholding the Commission's contention.

[fol. 36] It is clear from the foregoing cases and the provisions of the Communications Act that appellant is not a person aggrieved or one who has any rights or interests adversely affected by the grant to Fetzer. Accordingly, appellant has no standing to appeal the grant to Fetzer,

and the Commission's Motion to Dismiss the Appeal should be granted.

Federal Communications Commission.
(Signed.) Charles R. Denny, General Counsel, Harry M. Plotkin, Assistant General Counsel; (S.) Joseph M. Kittner, Counsel.

Acknowledgment of Service

Service of "Appellee's Motion to Dismiss the Appeal" and "Brief in Support of the Motion ot Dismiss Appeal" acknowledged this 27 day of October, 1944.

Harold G. Cowgill, Counsel for Appellant; Reed T. Rollo, Counsel for Intervenor.

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF INTENTION TO INTERVENE—Filed October 30, 1944

Come now John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, and pursuant to Section 402(d) of the Communications Act of 1934, as amended, give notice of their intention to intervene in the above entitled cause for the reasons set forth below in the Statement of Intervener's Interest.

Statement of Intervener's Interest

Intervener is interested in this proceeding, and it would be aggrieved and its interests adversely affected by a reversal of the decision of the Federal Communications Commission appealed from herein, for the following reasons:

1. John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, filed with the Federal Communications Commission, on March 20, 1944, an application for construction permit to erect a new standard broadcast station at Grand Rapids, Michigan to operate on the frequency 1230 kilocycles with 250 watts power, unlimited time. On June 27, 1944 the Commission, finding that a grant of the application would serve public interest, convenience and necessity, granted the same pursuant to Section 309(a) of the Communications Act of 1934, and a

permit to construct Station WJEF was issued to intervener in pursuance of that action.

2. Appellant is licensed to operate Station WKBZ at Muskegon, Michigan on the frequency 1490 kilocycles with 250 watts power, unlimited time. On May 5, 1944 it filed an application for construction permit to change its frequency to 1230 kilocycles. The simultaneous use of 1230 [fol. 38] kilocycles at Grand Rapids, Michigan and Muskegon, Michigan, cities separated by a distance of approximately fifty miles, would result in intolerable interference to both stations and, therefore, appellant's application and intervener's application were mutually exclusive. The Commission was unable to find, upon a comparative examination of the aforesaid applications that the grant of appellant's application would serve public interest, convenience or necessity and, on June 27, 1944, the application was designated for hearing. It is now scheduled on the Commission's docket for hearing on December 5, 1944.

3. Appellant thereafter filed a petition for hearing, rehearing or other relief, requesting that the Commission (1) reconsider and set aside its action of June 27, 1944 in granting intervener's application, (2) designate both applications for hearing, or (3) in the alternative, stay the issuance of any construction permit for the use of 1230 kilocycles at Grand Rapids until action should be taken upon the petition and until appellant should have had an opportunity to file a notice of appeal pursuant to Section 402(b)(2) of the Communications Act of 1934. This petition was wholly denied by the Federal Communications Commission on September 12, 1944. The Commission, in its decision and order on said petition, found that the grant of intervener's application did not contravene Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission, as claimed by appellant, and that, in fact, the grant would result in the establishment of a new service to a very substantial population and without objectionable interference with any existing service area, whereas the slight increase in radio service which would result in the grant of appellant's application would be offset by objectionable interference to another station. These conclusions are amply supported by the technical data filed with the two applications. The Com-

mission likewise found that the grant of intervener's application was consistent with the provisions of Section 3.35 of its Rules and Regulations, that no valid reason had been disclosed for setting aside the action of June 27, 1944 granting intervener's application, nor any reason for staying the grant to intervener pending the filing of appellant's notice of appeal.

[fol. 39] 4. A reversal of the decision of the Commission as requested by appellant would deprive intervener of its permit to construct a radio station in Grand Rapids and of an invaluable right to give to the City of Grand Rapids the additional broadcasting service to which it is entitled.

John E. Fetzer and Rhea Y. Fetzer, doing Business as Fetzer Broadcasting Company, (Signed) by Louis G. Caldwell, Reed T. Rollo, E. D. Johnston, Its Attorneys, 914 National Press Building, Washington, D. C.

Duly sworn to by Reed T. Rollo; jurat omitted in printing.

October 28, 1944.

[fol. 40] Acknowledgment of Service

Receipt of a true copy of the foregoing Notice of Intention to Intervene and Statement of Intervener's Interest is acknowledged this 30th day of October, 1944.

Ashbacker Radio Corporation, by (Signed) Philip J. Hennessey, Jr., Attorney for Appellant. Federal Communications Commission, By (Signed) Harry M. Plotkin, Attorney for Appellee.

[fol. 41] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION FOR STAY ORDER—Filed October 30, 1944

Come now John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, intervener

herein, and oppose the motion for stay order filed by the appellant.

Opposition to Motion

1. John E. Fetzer and Rhea Y. Fetzer are partners doing business as Fetzer Broadcasting Company. As such partnership, they have this day filed Notice of Intention to Intervene and Statement of Intervener's Interest in the appeal taken by Ashbacker Radio Corporation from a decision of the Federal Communications Commission on June 27, 1944 granting intervener's application for construction permit for a new standard broadcast station to operate at Grand Rapids, Michigan on the frequency 1230 kilocycles, with 250 watts power, unlimited time.

2. Ashbacker Radio Corporation holds a license from the Commission authorizing the operation of Station WKBZ at Muskegon, Michigan on the frequency 1490 kilocycles with 250 kilowatts power, unlimited time. On May 5, 1944, after Fetzer Broadcasting Company had filed its application for construction permit on March 20, 1944, appellant filed an application for authority to operate WKBZ on 1230 kilocycles instead of its present frequency. The two applications were mutually exclusive because of the destructive electrical interference which would result from their simultaneous operation on 1230 kilocycles. The WKBZ application was designated for hearing upon the same date that the Fetzer application was granted. Ashbacker Radio Corporation filed a petition for "hearing, rehearing, or other relief" and it was denied on [fol. 42] September 12, 1944. In the Commission's decision and order upon the petition it compared the merits of the two applications and found, upon the basis of data filed with the applications, that WKBZ would serve approximately 3972 additional potential listeners at night and 9815 additional potential listeners in the daytime, if operated on 1230 kilocycles, whereas the Fetzer station at Grand Rapids would provide a new service to a population of approximately 202,800 at night and 238,800 in the daytime. The Commission found, also, that WKBZ would cause objectionable interference to about 5% of the primary daytime service area of a third station, whereas the Fetzer station would not cause objectionable interference to any existing station. It concluded, therefore, that

the grant complained of did not contravene Section 307(b) of the Communication's Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission insofar as they require the Commission to provide a fair, efficient and equitable distribution of radio service among the several states and communities. The Commission likewise found that the grant was not contrary to Section 3.35 of the Commission's Rules and Regulations, as contended by appellant, and that no valid reason had been disclosed for setting aside the grant to the Fetzer Broadcasting Company.

3. Appellant asks the Court to issue an order to the Commission suspending, pending determination of the appeal, the effectiveness of the Commission's actions of June 27, 1944 and September 12, 1944 granting intervener the authorization of which appellant complains. Appellant alleges in support of its motion that there is no plain adequate or speedy remedy to prevent irreparable injury to the appellant and to the public other than the issuance of an order of stay by this Court.

It is generallly recognized that a stay order may be obtained by those, and only those, having a right to appeal and who are affected by the decision in question. Appellant bases its right to appeal on Section 402(b)(2) of the Communications Act of 1934, which section provides that an appeal may be taken from decisions of the Commission by a person aggrieved or whose interests are adversely affected by a decision granting or refusing certain types of applications, of which intervener's application is [fol. 43] one. Appellant's complaint is that intervener's application was granted without a hearing while appellant's application was designated for hearing. That is true, but the Commission is empowered, under Section 309(a) of the Communication's Act, to grant applications without a hearing when it finds that public interest, convenience or necessity will be served by the grant. It so found when it considered intervener's application and it, therefore, granted it. Since it did not find that a grant of appellant's application would serve public interest, convenience, or necessity, it designated that application for hearing, which was all that it was required to do. The application is now scheduled for hearing on December 5 and appellant can

not properly assume that the hearing will not conform to constitutional requirements. This being the case, appellant is not aggrieved and its interests are not adversely affected by the grant of the application of the Fetzer Broadcasting Company. It follows that appellant does not have an appealable interest under Section 402(b)(2) of the Communication's Act and is not entitled to a stay order.

4. Appellant does not state that irreparable injury will result to itself or to the public if a stay of the Commission's decision is not issued. It does not allege that WKBZ will suffer electrical interference from the operation of the proposed Fetzer station, nor does it state that it will suffer any economic injury. It could not support such allegations, if made. To be entitled to a stay, appellant must show a reasonably anticipated irreparable injury and it should appear that such injury is imminent. Such anticipated injury must be real and not imaginary. Appellant has not shown that it will suffer such an injury. Neither has it shown that any irreparable injury will result to the public if a stay is not issued pending determination of the appeal. The indications are to the opposite effect, in fact, because the small segment of the public which would receive additional service if WKBZ operated upon 1230 kilocycles instead of its present frequency is in the same position that it was prior to the Commission's decision, and that position will not change, while a much larger portion of the public will the sooner receive an additional service, that from the proposed Fetzer station, if the Fetzer Broadcasting Com- [fol. 44] pany is permitted to proceed with the construction authorized.

Wherefore, the premises considered, it is submitted that appellant's motion for stay order should be denied.

John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company. By (Signed) Louis G. Caldwell, Reed T. Rollo, E. D. Johnston, Its Attorneys, 914 National Press Building, Washington, D. C.

October 28, 1944.

Acknowledgment of Service

Service of the foregoing Opposition to Motion to Stay Order is hereby acknowledged and a true copy thereof received this 30th day of October, 1944.

(Signed) Philip J. Hennessey, Jr. Counsel for Ashbacker Radio Corporation. Harry M. Plotkin, Counsel for Federal Communications Commission.

[fol. 45] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

REPLY TO INTERVENERS' OPPOSITION TO MOTION FOR STAY—Filed November 2, 1944

Both the Commission and the Intervenors oppose the issuance of a stay order on the ground that the Court lacks jurisdiction of this appeal. Obviously, unless the Court has jurisdiction, any stay order will be a nullity and may be disregarded. But the issue of jurisdiction should properly be, and has been, raised by a motion to dismiss filed by the Commission on October 27, 1944. The fact that this motion to dismiss is pending and undecided is a further reason for maintaining the status quo.

There is a significant divergence of views between the Commission and the Intervenors on their second common ground of opposition—that a stay order is unnecessary. The Commission asserts that it may rescind the Intervenors' construction permit after a hearing upon, and limited to, appellant's application. The Intervenors are careful not to adopt this argument. Clearly, if the Commission should attempt to revoke their construction permit, the Intervenors would demand a hearing upon their own application in addition to the right, already accorded them by the Commission, of participating in the hearing upon the Ash- [fol. 46] backer application. Yet, both the Commission and the Intervenors deny that the appellant has identical reciprocal rights to be heard upon both applications.

The Intervenors argue that a stay order is unnecessary

to prevent irreparable injury to appellant and to the public in the Muskegon area. But they also argue, inconsistently, that the issuance of a stay order will, in fact, cause irreparable injury to them and to the public in the Grand Rapids area. All that appellant asks is that both parties be returned to the positions they occupied prior to the Commission's decision and that they continue in those positions until this appeal is decided. No one could be prejudiced by such a course.

As the Supreme Court pointed out in the Scripps-Howard case, 316 U. S. 4:

> "No Court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a Court can do. But within these limits, it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong."

A stay order in this case is necessary to prevent not merely those changes which will occur through mere lapse of time but, as well, changes which are currently being brought about by the affirmative actions of the Intervenors themselves in constructing their station at Grand Rapids.

Respectfully submitted, Ashbacker Radio Corporation. By Philip J. Hennessey, Jr., George S. Smith, Harold G. Cowgill, Segal, Smith & Hennessey, 1026 Woodward Building Washington 5, D. C. Attorneys for Appellant.

November 2, 1944.

[fol. 47] Acknowledgment of Service

Service of a copy of appellant's "Reply to Intervenors' Opposition to Motion for Stay" is acknowledged this 2nd day of November, 1944.

Harry M. Plotkin, Counsel for Appellee. Reed T. Rollo, Counsel for Intervenors.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION TO DISMISS—Filed Nov. 9, 1944

Appellant opposes the Commission's motion to dismiss this appeal for the reasons hereinafter set forth.

I

The Facts

The Commission's motion to dismiss discloses that the parties are in agreement upon all material facts—the Ashbacker and Fetzer applications were filed from the same section of Michigan for the same unused frequency, were presented to the Commission for action on the same day under the same law and regulations. Upon a "comparative consideration of the two applications," without hearing, the Commission granted the Fetzer application. It cannot now grant the Ashbecker application without rescinding its grant to Fetzer and, unless directed to do so by this Court, it will not hold a comparative hearing upon both applications at any time.

II

The Issues

The immediate issue raised by the Commission's motion to dismiss is one of appellate jurisdiction—whether Ap- [fol. 49] pellant has a sufficient interest in the Fetzer application to qualify as a person "aggrieved or adversely affected" within Sec. 402(b)(2) of the Communications Act. If so, the Court has jurisdiction to consider this appeal; if not, the motion to dismiss must be granted.

But there is more at stake than Appellant's statutory right of appeal. Appellant's interest, or lack of interest, in the Fetzer application also determines:

(1) Appellant's right to a comparative hearing before the Commission.

(2) Whether a hearing limited to Appellant's application is sufficient.

(3) The power of the Commission, after a hearing limited to the Ashbacker application, to rescind the construction permit issued to Fetzer.

(4) Appellant's right to any rehearing under Sec. 405 of the Act.

In short, when it acts upon this motion to dismiss, the Court fixes the rights of conflicting applicants throughout the whole procedural scheme of the Communications Act.

III

Argument

1. *Appellant's Right to a Comparative Hearing Before the Commission.*

This case is squarely within this Court's decision in *Symons Broadcasting Company* v. *Federal Radio Commission*, 62 App. D. C. 46, 64 Fed. (2d) 381 and the motion to dismiss cannot be granted without overruling the Symons case. In each instance, there was pending before the Commission at the time it granted one application a conflicting application for the same facilities. In the Symons case, [fol. 50] the Court said:

> "* * * we think it not untimely to say that in granting and refusing applications for licenses, where two or more stations are applicant for the same frequency it is the duty of the commission to grant either party asking it a hearing on due notice, for otherwise there is a denial of due process and a substitution in its place of arbitrary power, and that, of course, may not be countenanced. * * *"

The Symons decision, moreover, construed Sec. 11 of the Radio Act of 1927. In the following year, Congress reenacted Sec. 11 of the Radio Act as Sec. 309(a) of the Communications Act of 1934 and, having used identical language in both sections, must be assumed to have adopted the construction placed upon the words in the Symons decision.

In *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, the Supreme Court

expanded the doctrine of the Symons case to embrace conflicting applications, however far separated in filing date, pending before the Commission at any one time.

Other decisions of this Court, including those upon which the Commission relies, are readily distinguishable.

In *Telegraph Herald Company* v. *Federal Radio Commission*, 62 App. D. C. 240, 66 Fed. (2d) 220, the Appellant had not filed a formal application.

In *Colonial Broadcasters, Inc.*, v. *Federal Communications Commission*, 70 App. D. C. 258, 105 Fed. (2d) 781, Appellant filed its application more than a month after the Commission had designated the conflicting Lucas application for hearing.

In *Palmer* v. *Federal Communications Commission*, #7542, February 16, 1940, unreported, the Palmer application was filed more than a month after the Commission had designated the Wilson and Schuman application for hearing.

In *Frequency Broadcasting Corp.*, v. *Federal Communications Commission*, #8055, April 26, 1942, the Commission [fol. 51] had actually approved Appellant's application on the condition that it amend for another frequency equally available.

Until 1939, it was the Commission's established practice, under Rules with which this Court is familiar, to designate conflicting applications for consolidated hearing. These Rules recognized two types of conflict:

(a) *Patent* conflicts, apparent on the face of the application as in this case. Under these circumstances, Sec. 106.4 of the Commission's Rules provided:

> "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, excepting, however, applications filed after any such application has been designated for hearing."

See *Colonial Broadcasters, Inc.*, v. *Federal Communications Commission*, 70 App. D. C. 258, 105 Fed. (2d) 788.

(b) *Latent* conflicts not readily apparent from the application itself. Under these circumstances, the Commission had its "protest" rule (originally Sec. 45 FRC Rules & Regulations) which provided:

"45. In any case where an application is granted in whole or in part without a hearing as provided in paragraph 44, any person, firm, or corporation aggrieved or whose interests are adversely affected by such grant, may obtain a hearing upon said application by adhering to the following procedure:

"a. Such parties shall, within 20 days from the date on which public announcement of such grant is made at the principal office of the Commission, or from its effective date if a later date is specified by the Commission, file with the Commission and serve upon or mail to the applicant a protest in writing directed to the action of the Commission making such grant.

"b. • • •

"c. Upon receipt by the Commission of such protest the application involved will be set for hearing in the same manner in which other applications are set for hearing and the applicant and other parties in interest notified thereof: *provided, however,* That upon such [fol. 52] hearing the verified protest shall be taken as a pleading limiting the issues to be tried, but not as evidence of the facts therein stated."

See *Symons Broadcasting Company* v. *Federal Radio Commission*, 62 App. D. C. 46, 64 Fed. (2d) 381.

Although no changes were made in the statute itself, both these rules were abolished by the Commission in 1939 and it now asserts the right, in its discretion, and in the absence of any rule of its own which might limit that discretion, to conduct consolidated hearings upon conflicting applications or related hearings on the same day, or unrelated hearings on different days.

But the Commission is still required by Sec. 309(a) of the Communications Act and the due process clause of the Fifth Amendment to grant a fair and adequate hearing to every applicant before his application is denied. The decision in the *Symons* case stands upon this broad statutory and constitutional base. Under the circumstances of this

case, the requirements of a fair and adequate hearing can be met only by affording Ashbacker and Fetzer a comparative hearing.

2. *A Hearing Limited to Appellant's Application is Insufficient.*

On the same day that the Commission granted the Fetzer application it designated the Ashbacker application for a unilateral, non-comparative hearing now scheduled for December 5, 1944. It asserts that Appellant is entitled to no more, either under Sec. 309(a) of the Act or the Fifth Amendment.

This Court has expressed itself unmistakably on after-the-fact proceedings of this character. If Congress meant anything by the word "hearing" it meant a fair and adequate opportunity after notice and upon issues clearly defined to assert and defend rights *before* decision. *Saltzman* v. *Stromberg-Carlson Company*, 60 App. D. C. 31, 46 Fed. (2d) 612, *Courier-Journal Company* v. *Federal Radio* [fol. 53] *Commission*, 60 App. D. C. 33, 46 Fed. (2d) 614, *Westinghouse E. & M. Company* v. *Federal Radio Commission*, 60 App. D. C. 53, 47 Fed. (2d) 415.

The real nature of the "hearing" which the Commission intends to hold on December 5, 1944 is evident from the Commission's own application forms. When filed, both the Ashbacker and Fetzer applications requested the *unused* frequency of 1230 kilocycles. Each application form contained the question:

> "Does applicant request the assignment of all or any part of the facilities (i. e., frequency, power, and/or hours of operation) now assigned to any other station or stations?"

To this question each applicant answered "No."

The hearing now offered Appellant is not a hearing upon its application as filed. The Fetzer application having been granted, Appellant cannot now undertake to justify operation of its station on an unused frequency. Instead it has been saddled with the burden of showing that the new station of Fetzer (WJEF) should have its license modified or revoked. Without Appellant's consent and over its protest the Commission has amended its application in this vital

respect. Further, the Commission allowed Fetzer to intervene in the hearing upon, and limited to, the Ashbacker application because it finds that Fetzer has an interest in the Ashbacker application even while it denies that Ashbacker has any interest in the Fetzer application!

3. *After a Hearing Limited to the Ashbacker Application, the Commission Cannot Rescind Fetzer's Construction Permit*

The Commission represents that after a hearing upon, and limited to, the Ashbacker application, it may rescind Fetzer's construction permit. Otherwise, of course, the December 5 proceeding becomes a mere post-mortem.

The grant to Fetzer, purportedly under Sec. 309(a) of the Act, was made with full knowledge that the Ashbacker [fol. 54] application was pending; that the two applications were mutually exclusive; and that if either were granted, the other must be denied.

If it was lawful for the Commission to grant the Fetzer application under these circumstances, then the Commission is required by Sec. 319(a) of the Act to issue Fetzer a license as soon as the station is constructed. Thereafter, the Commission cannot revoke or modify Fetzer's license except upon due notice and hearing as required by Secs. 303(f) and 312(b) of the Communications Act.

Any hearing upon the Ashbacker application is a collateral proceeding and the Commission's Notice of Hearing to Ashbacker clearly recognizes this fact. This Notice does not even suggest that any revocation, modification or suspension of the Fetzer station license is contemplated by the Commission.

A revocation of the Fetzer station license without according Fetzer a hearing would be consonant with the actions taken upon the Ashbacker application but it would compound, rather than cure, the original error.

4. *Appellant's Right to a Rehearing under Sec. 405 of the Act*

Sec. 405 of the Act is the statutory equivalent of the Commission's former "protest rule." It provides a method for curing errors in administrative proceedings without re-

course to the courts. It may be invoked by any party or "any person aggrieved or whose interests are adversely affected" by a decision of the Commission and thus is co-extensive in scope with Sec. 402(b)(2) of the Act.

When the Commission denied Appellant's Petition for Hearing, Rehearing and Other Relief, it was construing a statutory enactment rather than one of its own rules. Despite the decision in the *Symons* case it refused to accord Appellant the fair comparative hearing to which Appellant was entitled under the Act and the Constitution.

[fol. 55] 5. *Appellant is Entitled to Maintain this appeal under Sec. 402(b)(2) of the Act*

For all the reasons that entitled Appellant to a hearing in the first instance and later to some appropriate form of relief under Sec. 405 of the Act, it is "aggrieved and adversely affected" within the meaning of Sec. 402(b)(2).

The Commission has steadfastly declined to ascribe any meaning to the words "aggrieved or adversely affected" in Sec. 402(b)(2). It contended that economic interest in an application was insufficient to give this Court jurisdiction in *Sanders Bros.* v. *Federal Communications Commission*, 309 U. S. 470, 642. It contended that electrical interference was insufficient in *National Broadcasting Company, Inc., (KOA)* v. *Federal Communications Commission*, 319 U. S. 239. It now takes the extreme position that one of two flatly conflicting applicants has no such interest in the other as entitles it to hearing or to appeal.

Unless this Court has jurisdiction of this appeal under Sec. 402(b)(2) of the Act, there can be no judicial review of the Commission's action. *Black River Valley Broadcasts, Inc.*, v. *McNinch, et al.*, 69 App. D. C. 311, 101 Fed. (2d) 235. If the motion to dismiss is granted, the Commission thus becomes the sole and final judge of its own action in this and similar cases.

IV

Conclusion

We respectfully request that the motion to dismiss be denied or, in the alternative, in view of the important ques-

[fol. 56] tions of public and private interest which are involved, that the motion to dismiss and this opposition be designated for oral argument.

Respectfully submitted, Ashbacker Radio Corporation, by Philip J. Hennessey, Jr., George S. Smith, Harold T. Cowgill, Segal, Smith & Hennessey, 1026 Woodward Building, Washington 5, D. C., Attorneys for Appellant.

November 9, 1944.

Acknowledgment of Service

Service of a copy of Appellant's "Opposition to Motion to Dismiss" is acknowledged this 9th day of November, 1944.

Harry M. Plotkin, Washington, D. C., Counsel for Appellee; E. D. Johnston, National Press Bldg., Washington, D. C., Counsel for Intervenors.

[fol. 57] Copy

In United States Court of Appeals for the District of Columbia, January Term, 1945

No. 8871

Ashbacker Radio Corporation, Appellant,

vs.

Federal Communications Commission, Appellee,

Fetzer Broadcasting Company, Intervenor

Before: Groner, C. J., and Miller and Edgerton, JJ.

Order Dismissing Appeal—Filed January 24, 1945

This cause came on to be heard on the notice of appeal, the notice of intention to intervene, and on appellee's motion to dismiss the appeal and appellant's objections thereto.

On consideration whereof, It is ordered and adjudged by the Court that the motion to dismiss be granted, and that this appeal be, and it is hereby, dismissed.

Per Curiam.

Dated January 24th, 1945.

[File endorsement omitted.]

[fol. 58] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed April 23, 1945

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Notice of Appeal.
2. Motion for Stay Order.
3. Opposition to Motion for Stay Order.
4. Motion to Dismiss (Commission's).
5. Notice of Intention to Intervene (Fetzer B/C Co.).
6. Intervenor's opposition to motion for stay order.
7. Appellant's reply to intervenor's opposition to motion for stay.
8. Appellant's answer to motion to dismiss.
9. Per curiam order dismissing appeal.

Paul M. Segal, Woodward Building, Washington 5, D. C., Attorney for Ashbacker Radio Corporation.

April 23, 1945.

[fol. 59] Acknowledgment of Service

Receipt of a copy of Appellant's "Designation of record" is hereby acknowledged this 23rd day of April, 1945.

Harry M. Plotkin, Washington, D. C., Counsel for Appellee; Reid T. Rollo, National Press Bldg., Washington, D. C., Counsel for Intervenors.

fol. 60] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on Cover: File No. 49,649. U. S. Court of Appeals, District of Columbia. Term No. 1196. Ashbacker Radio Corporation, Petitioner, vs. Federal Communications Commission. Petition for a writ of certiorari and exhibit thereto. Filed April 24, 1945. Term No. 1196 O. T. 1944.

[fol. 61] Supreme Court of the United States

Order Allowing Certiorari—Filed May 28, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(9630)